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State Personnel Board

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August 4, 2020

MEMORANDUM

TO: Julian L. McPhillips, Esq.
Gilda Branch Williams, Esq.
Kaasha D.B. Griffin, Esq.

FROM: Randy C. Salle' *RCS*
Chief Administrative Law Judge

RE: 36-26-27(b) Complaint filed by Tina Zacher against
Patricia Jones and Sam Thomas

Enclosed please find a copy of the Recommended Order to the State Personnel Board in connection with the above-referenced complaint. This matter will be placed on the Board's agenda for their next regularly scheduled meeting, currently set for August 19, 2020. At that time, the Board will issue a Final Order in this matter.

**BEFORE THE ALABAMA
STATE PERSONNEL BOARD
IN THE MATTER OF**

Tina Zacher,)	
)	
Complainant,)	
)	
vs.)	CASE NO. 20-28-RCS
)	
Sam Thomas and Patricia Jones,)	
In their Official Capacities as)	
Employees of the Alabama)	
Department of Transportation,)	
)	
Respondents.)	

RECOMMENDED ORDER OF DISMISSAL

I. Procedural and Factual Background

On June 16, 2020, Tina Zacher (“the Complainant” or “Zacher”), a Transportation Worker for the Alabama Department of Transportation (“ALDOT”) filed a complaint with State Personnel Director Jackie Graham (“Graham”) against her reviewing supervisor, District 76 Administrator Sam Thomas (“Thomas”) and Administrative Support Assistant II (“ASA II”) Patricia Jones (“Jones”). Zacher initially charged Thomas and Jones with falsification of Records, conduct unbecoming a state employee, and disruptive conduct of any sort. Zacher brought her charges under the State Personnel Board Administrative Code §670-X-2-.01 which states, “these rules shall apply to all positions in the classified service.”

On July 1, 2020, the undersigned conducted a conference call with Zacher and ALDOT attorney Kaasha D. Griffin, Esq. ("Griffin"). The undersigned explained that pursuant to the rules Zacher relied upon, the State Personnel Board did not have jurisdiction within those rules to conduct a hearing by one employee against other employees. Zacher was encouraged to file a grievance through ALDOT's grievance procedures. On July 2, 2020, the undersigned mailed Zacher a letter summarizing the conference call. On July 7, 2020, Zacher refiled her complaint as a citizen, taxpayer complaint under Alabama Code §36-26-27(b).

Zacher maintained in her citizen, taxpayer complaint that she reported to work on May 26, 2020, and informed her immediate supervisor, Rodney Reeves ("Reeves") that on Saturday, May 23, 2020, she received a phone call from MainStreet Urgent Care ("Urgent Care") stating she tested positive for COVID-19. Zacher told Urgent Care it was impossible because she was never tested for COVID-19. Urgent Care hung up on Zacher. Zacher alleged she called Urgent Care back and they admitted they made a mistake. Zacher was concerned that if she did not inform Reeves about what transpired over the weekend, she would get in trouble if Urgent Care called ALDOT. Zacher was immediately sent home and told to get written confirmation from Urgent Care. Zacher contended she faxed confirmation from Urgent Care at approximately 10:30 a.m. that same day. Reeves told Zacher to return to work on May 27, 2020. Upon arriving at work on May 27, 2020, Zacher

alleged she was placed on mandatory leave and sent home pending an investigation. On June 3, 2020, Zacher received a notice of pre-dismissal and pre-dismissal conference delivered by Thomas and Jones at her residence. Zacher believed Thomas and Jones omitted relevant facts pertaining to her case and fabricated the events of May 26, 2020 up the chain of command. In Zacher's July 7, 2020 letter, she dropped one charge, disruptive conduct of any sort, but continued to charge Thomas and Jones with falsification of Records and conduct unbecoming a State employee.

Another status conference was held on July 16, 2020, wherein the complaint was discussed, the hearing details were discussed, and Zacher was given until the following week to decide if she wanted to pursue a 36-26-27(b) hearing. On July 21, 2020, Zacher notified the undersigned through Counsel that she wanted to proceed with a hearing, which was promptly scheduled for Thursday, July 30, 2020.¹

On July 29, 2020, ALDOT filed a Motion to Dismiss maintaining that the State Personnel Board lacked jurisdiction under §36-26-27(b) because the Board "...lacked authority to interpret legislation and determine its application to complaints filed by a departmental employee against employees of the same

¹ This was the last possible hearing date pursuant to the statute, offered to give the parties' an opportunity to maximize pretrial preparations.

agency...”² ALDOT also indicated that “The Alabama Attorney General is tasked with the responsibility to examine legislation as to its clarity and constitutional validity under Alabama Code §36-15-1.”³ ALDOT further contended Zacher failed to exhaust her administrative remedies and ALDOT had primary jurisdiction over improper conduct within its department.

Standard of Review on Motion to Dismiss

The standard of review applicable to a motion to dismiss for lack of subject matter jurisdiction is well established. Once a party challenges the jurisdiction of the trial court, the burden of establishing jurisdiction is on the plaintiff [complainant in this case]. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980); see also *Ex parte Healthsouth Corp.*, 974 So.2d 288 (Ala. 2007).

II. State Personnel Board has Jurisdiction over this matter

ALDOT contended the State Personnel Board “lacks the authority to interpret legislation and determine its application...” ALDOT also contended that authority rests solely with the Alabama Attorney General under §36-15-1. ALDOT argued that, since the State Personnel Board cannot interpret legislation, it therefore cannot determine that 36-26-27(b) may be applied to employees filing complaints against their supervisors.

² Motion to Dismiss, page 4, #7.

³ Motion to Dismiss, page 5, #8.

The Alabama Legislature placed within the laws of the State Personnel Board, Ala. Code §36-26-27(b), which states:

In addition to the removal by an appointing authority, persons in the classified service may be removed or disciplined in the manner described in this subsection. Charges may be filed by any officer, citizen or taxpayer of the state with the director who shall, within five days, cause a copy to be served upon the person complained against and shall set a day not less than 10 nor more than 20 days after such charges have been served on such employee for public hearing of such charges. This hearing may be before the director; a special agent appointed for the purpose by the director or the board itself. If before the director or a special agent, the director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the board, within five days, a findings of facts and law involved and a recommended decision.

In this case, Zacher filed a complaint as a citizen/taxpayer against two classified employees of the State alleging they violated State Personnel Board General Work Rules. The language in the statute is broad and does not specifically preclude state employees who are citizens and taxpayers of Alabama from filing complaints against other state employees. No doubt, this concerns state employees and state agencies alike, but absent an Attorney General Opinion or clarification from the courts, the current case law on this matter makes the hearing of an action filed under §36-26-27(b) absolute.

It appears ALDOT attempted to rely on language from a prior matter filed before the State Personnel Board in the case Long v. Ficquette, Case No. 12-22-RCS. In that case, the undersigned recommended the State Personnel Board dismiss a complaint filed under §36-26-27(b). The reason that case is distinguishable from this case is that the sole issue in that case was the interpretation of a Department of Human Resources law. The undersigned recommended that since the sole issue was one of legislative interpretation, it fell within the authority of the Attorney General's office under §36-15-1. In this case, a citizen and taxpayer alleged classified employees violated General Work Rules as they carried out their assigned duties. Those facts squarely fall within the context of §36-26-27(b).

Further, *State Personnel Bd. v. Prestwood*, 702 So.2d 176 (Ala.Civ.App. 1997), affirms the jurisdiction of the State Personnel Board in this matter. In that case, the State Personnel Board declined jurisdiction over a citizen complaint filed under Alabama Code §36-26-27(b), however, the Alabama Court of Civil Appeals remanded the case back to the State Personnel Board stating, "The repeated use of the word shall in Section 36-26-27(b), as well as the declaration of what appeared to be mandatory time limits, indicate the Board has no discretion about whether to hear a 'citizen' complaint." *Id.* at 179.

ALDOT also maintained that if the State Personnel Board proceeded with a hearing, then the situation discussed in *Bethlehem Steel Co. v. New York Labor*

Relations Bd., 330 US 767,776 (1947) would be present. In that case, the United States Supreme Court noted:

If the two [administrative bodies] attempt to exercise concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict.

ALDOT argued they have primary jurisdiction over how their employees should be disciplined. Even if that is true, the Court in Prestwood addressed that argument head on and found, “However, unlike a circuit court, which has general plenary jurisdiction...but which may choose, for prudential reasons, to limit the exercise of its jurisdiction—the Board has only the jurisdiction granted to it by the legislature. Accordingly, when the legislation directs the Board to exercise its jurisdiction in a certain matter, the Board has no discretion to decline the exercise of that jurisdiction.” (Id. 179).

Finally, ALDOT asked the undersigned to dismiss the action because Zacher failed to state a claim against Thomas and Jones. ALDOT attached affidavits to its Motion to Dismiss thereby creating a Motion for Summary Judgment. Once a complaint is filed, the undersigned only has the powers conferred upon him by the Board. The Board does not permit the undersigned to dismiss actions based upon limited sets of facts, directed verdicts, or based solely on the pleadings. The

undersigned denied ALDOT's Motion to Dismiss and conducted a hearing pursuant to the Alabama Administrative Procedure Act.

III. Findings of Fact

On Saturday, May 23, 2020, Zacher received a telephone call by Urgent Care stating she tested positive for COVID-19. Zacher argued with the Urgent Care representative stating it was impossible because she had not been to Urgent Care and was not tested for COVID-19. At that point, the Urgent Care representative hung up on Zacher. Zacher called Urgent Care back and an Urgent Care representative told Zacher their phone call was a mistake.

On Tuesday, May 26, 2020, following the Memorial Day holiday, Zacher carpooled to work with co-worker and boyfriend, Doug Prater ("Prater"). As soon as Zacher arrived she walked up to her rating Supervisor, Reeves, and told him what transpired on the phone with Urgent Care over the weekend. Prater testified he heard Zacher tell Reeves, "Don't go crazy, there's no way this can be true" before he entered a building. Zacher testified she told Reeves she had not been tested and had not gone to Urgent Care. Zacher indicated she alerted her Supervisor "ONLY" out of courtesy, in case Urgent Care called ALDOT.⁴ Zacher and Prater were both sent home.

⁴ Zacher's June 16, 2020 complaint, page 1.

Zacher left work and went to Urgent Care to receive written evidence that the call over the weekend was erroneous. While there, Prater called Zacher and told her about a call he had with Reeves where Reeves told him Thomas wanted written confirmation from Urgent Care. Urgent Care faxed confirmation to Thomas and Reeves around 10:00 a.m. – 10:30 a.m. on May 26, 2020.⁵

The letter stated:⁶

To Whom it May Concern:

Tina Zacher contacted the MainStreet Family Care clinic in Eufaula, Alabama this morning stating that she had received a phone call regarding positive COVID-19 results. However, it appears that this call was made in error since Ms. Zacher has not visited our office requesting COVID-19 testing. In fact, I have no record of Ms. Zacher visiting our clinic this year.

I sincerely apologize for any issues this mistake has caused and will thoroughly investigate the situation in an effort to determine the cause and prevent similar issues in the future...

Around 1:00 p.m. on May 26, 2020, Prater called Reeves to ask when he and Zacher may return to work. Reeves told Prater that both could return to work the next day, on May 27, 2020. When Zacher and Prater arrived to work the next day, Zacher was placed on mandatory leave pending an investigation.

⁵ The email from Urgent Care to Thomas was actually sent at 1:03 p.m.

⁶ Zacher Exhibit D.

On May 29, 2020, Zacher and Prater filed a “Joint Rebuttal, Request for Appeal, and Expungement from Record Request” because they believed Thomas did not forward the Urgent Care letter up the chain of command.

On June 3, 2020, Thomas and Jones delivered a “Notice of Proposed Dismissal and Pre-Dismissal Conference” to Zacher at her residence. The document was signed by Steve Dukes, Personnel Bureau Chief. In Zacher’s proposed dismissal letter, ALDOT alleged:

On May 26, 2020, you came to work and told the Superintendent that you had received a call from an Urgent Care facility on Sunday, May 24, 2020, stating that you had tested positive for COVID-19.

You were told that you should have followed the call-in procedures if you were positive for COVID-19, and not potentially expose co-workers by coming into the workplace. You were further instructed to go home and obtain documentation from the medical facility concerning your results. Immediately, steps were taken to determine any possible exposure to other employees that morning. At least one employee was sent home because of their potential exposure. After further questioning of you by the District Administrator, you admitted that you had never been to a medical facility for symptoms, nor had you been tested for COVID-19. Because of your actions, you have been recommended for termination from the Alabama Department of Transportation.

After Zacher was recommended for dismissal, she began to file complaints with the State Personnel Director. Zacher believed Thomas and Jones were working together in a malicious way and she asked for such activity to cease.

Zacher also asked for her leave to be reinstated, back-pay and expungement of any disciplinary action in her personnel file.

In a letter dated June 30, 2020, Zacher acknowledged ALDOT agreed to reinstate her leave, give her back-pay for her time missed, and expunge any disciplinary action that was the result of the May 26, 2020 incident. Zacher initially refused ALDOT's proposal because she wanted a JUST resolution.⁷

In her July 7, 2020 letter, Zacher acknowledged ALDOT's attempts to resolve the matter with her. Zacher indicated she wanted her charges against Thomas and Jones addressed by ALDOT. ALDOT did not address the charges, therefore, Zacher filed this action under Ala. Code §36-26-27(b).

A hearing was held on July 30, 2020. Zacher and Prater testified on behalf of Zacher. ALDOT did not call any additional witnesses. During their testimony, Zacher and Prater essentially reiterated the events leading up to her proposed dismissal and confirmed the reinstatement of her leave, her cleared proposed disciplinary actions, and ALDOT's affirmation they would give her back-pay, although that money has not yet been received by Zacher.

Zacher provided a witness list that included Reeves, Thomas, Jones, Derreck Morris ("Morris") and Assistant Regional Engineer Matt Leverette ("Leverette"). Zacher did not call Reeves, Thomas, Jones, Morris or Leverette to testify at the

⁷ Zacher Exhibit b, page 2.

hearing. Zacher introduced 9 exhibits into the record, marked as a-d and B-F. An additional exhibit was added by Zacher over ALDOT's objection; it was initially labeled Zacher Exhibit F, however; after the hearing it is now Exhibit G since F already existed. ALDOT introduced 3 additional exhibits into the record, marked as ALDOT Exhibits 1-3.

The most compelling evidence in this matter is Zacher Exhibit G. On May 26, 2020 at 1:03 p.m., Thomas received an email from MainStreet Family Care that explained what happened to Zacher. At 2:05 p.m., Thomas forwarded that information to Departmental Operations Specialist Glenda Uptain ("Uptain"). Uptain's rating supervisor is Sharon Ellis and Leverette is her reviewing supervisor.⁸ The next day, on May 27, 2020, Thomas sent a letter recommending Zacher's dismissal to Uptain for review. Uptain made some recommended changes and instructed Thomas to add what type of discipline he suggested. Uptain told Thomas "Sheri has the right to concur or make another recommendation."⁹ Ultimately, Zacher was allowed to return to work, her leave was restored, her personnel file has no record of discipline based off this incident and ALDOT assured Zacher her back-pay would be deposited in short order.

⁸ SPD File

⁹ Zacher Exhibit G.

Prater testified that after considering the events Saturday and Sunday, he and Zacher decided to try and go to Urgent Care to get documentation. Urgent Care was closed for Memorial Day. Prater testified neither he nor Zacher believed they should have called a supervisor because her situation did not fall within the provisions of the May 15, 2020 memorandum. Prater testified he did not hear Zacher tell Reeves say, "I'm positive, but this cannot be true." Prater testified she may have.¹⁰

Zacher testified she approached Reeves on May 26, 2020 and told him, "Rodney, I need to tell you something, first of all, don't go going crazy or going wild, there is absolutely no way this can be true. I have not been to Urgent Care." Then she told Reeves about her call from Urgent Care and that she tested positive for COVID-19. Zacher feared Urgent Care may call ALDOT and she wanted to make sure they knew it was not true. Zacher confirmed the rest of Prater's general narrative of the events following that day. Zacher testified she went back to work on June 15, 2020.

Zacher feels like she was given harsh punishment for something out of her control. Zacher testified no one's safety was jeopardized by her actions or by what transpired with Urgent Care. Zacher did not feel the whole story made it up the chain of command. Zacher testified that "if they sent up the line that I have tested

¹⁰ Prater acknowledged he did not hear the entire conversation between Reeves and Zacher.

positive for COVID-19, then that is a falsification because I have not been tested for it.” Zacher testified she had no evidence Jones falsified any documentation, but she just knows Jones types all of [Thomas’] stuff. Zacher also testified she had no knowledge who made the marks and requested changes on Zacher Exhibit G.

IV. Discussion

COVID-19 is a global pandemic that has had a remarkable impact on the health, welfare, and safety of citizens and employees throughout the world. The illness is not yet fully understood and guidance on best practices continues to change at a rapid pace. The State of Alabama has a duty and responsibility to care for the public and its employees, as well as possible, by following Federal mandates and guidelines, Center for Disease Control recommendations, and State Health Officials rules and procedures. Many State Departments have issued guidelines and directives for its employees to utilize in the event they are exposed or potentially exposed to this horrible virus. It is impossible for an employer to consider every potential issue/dispute that may arise from newly created guidelines since those guidelines were implemented at a rapid pace.

On May 15, 2020 such a document was created by ALDOT Management and disseminated to Region Engineers, Bureau Chiefs, and Points of Contact.¹¹ The guidelines take into account various scenarios, such as if the employee: (1) states

¹¹ Zacher Exhibit F.

they are sick with certain symptoms, (2) has a temperature above 100.4 degrees Fahrenheit, (3) is under a healthcare professional's order to quarantine, (4) if the employee suspects he or she has been exposed to someone with COVID-19, (5) if an employee reports another employee has symptoms of COVID-19, (6) exhibits COVID-19 symptoms, has possibly been exposed to COVID-19, has definitely been exposed to COVID-19, (7) if an employee has contracted the COVID-19 virus, and (8) if an employee has a family member who is ill with the virus. None of these carefully articulated scenarios applied directly to Zacher's unique situation. On May 23, 2020, Zacher was misinformed by Urgent Care she tested positive for COVID-19, an issue she cleared up with Urgent Care later that day on the phone. Zacher went to work and told her immediate supervisor, Reeves, what happened on May 23, 2020. Reeves did not testify so it is unknown what Reeves heard or understood from the conversation with Zacher other than what Zacher testified she told Reeves.¹² It is also unknown what Reeves communicated to Thomas. Zacher was instructed to go home. Prater testified he got a call from Reeves who told him to tell Zacher that Thomas wanted something in writing from Urgent Care. Prater testified he and Zacher intended to fight this as far as they could. Prater acknowledged he does not know what Thomas did with the paperwork provided to

¹² She testified she told him it was a misunderstanding.

him by Zacher. Prater also testified he helped Zacher draft all paperwork submitted on her behalf.

Zacher is angry. Her anger is understandable. She had a series of unfortunate events occur that jeopardized her employment with ALDOT. All of those events were out of her control. Zacher wants someone at ALDOT held accountable for the stress she incurred as a result of her proposed termination. Hindsight is 20/20. Zacher could have chosen to do things differently to better protect herself on May 26, 2020, i.e., take a copy of the Urgent Care letter to work with her or call Reeves on Saturday, Sunday, or Monday to inform him of the unusual event. Regardless, in the early afternoon hours of May 26, 2020, Urgent Care sent a letter to Thomas clearing Zacher. The problem in this case is the lack of pertinent testimony. Zacher waffled on her exact wording to Reeves on May 26, 2020. There is no evidence in the record on what Reeves told Thomas. Thomas began disciplinary proceedings against Zacher on May 26, 2020. On May 27, 2020, Thomas began disciplinary paperwork against Zacher claiming she came to work after testing positive for COVID-19, although he did acknowledge in the first draft that Zacher indicated she did not know where the positive test came from.¹³ That remark was crossed out and Zacher was accused of causing an unnecessary

¹³ Zacher Exhibit G.

disruption based upon her “false” claim.¹⁴ Next, on June 3, 2020, Zacher was actually charged with disruptive conduct of any sort and conduct unbecoming a state employee after she came to work and told the superintendent she tested positive for COVID-19.¹⁵ Thomas was not called to testify about his actions, what Reeves communicated to him, or why he proceeded with mandatory leave and recommending Zacher’s dismissal. It appears there was a miscommunication, but without hearing from more witnesses, it is impossible to tell where the miscommunication occurred. It is just as likely a miscommunication occurred between Zacher and Reeves as it was between Reeves and Thomas, or even Thomas and the rest of the chain of command.

Zacher brought charges against two employees, Jones and Thomas in their official capacities as ALDOT employees. In order to succeed in her action, she had to prove, by a preponderance of the evidence, that the employees violated State Personnel Board General Work Rules. The law is well settled that a “preponderance of the evidence” standard requires a showing of a *probability* that the employee is guilty of the acts as charged. Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue. The evidence must establish that *more probably than not*, the

¹⁴ It is unclear who these charges came from and where they got their version of events.

¹⁵ Zacher Exhibit E.

employee performed, or failed to properly perform, as charged. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the APA’s preponderance of the evidence standard. *See also Wright v. State of Tex.*, 533 F.2d 185 (5th Cir. 1976).¹⁶

In the present case, Zacher failed to prove that Jones violated State Personnel Board, General Work Rule 670-X-19-.01(b)(6) Falsification of records or General Work Rule 670-X-19-.01(b)(13) Conduct unbecoming a state employee. In her affidavit, attached to Respondents’ Motion to Dismiss, Jones indicated she had no knowledge of the facts surrounding Zacher’s May 26, 2020 incident. Jones acknowledged she typed a document that would be presented to Zacher, but other than typing the document, she was not responsible for the contents within the document. Zacher even admitted during her testimony she had no evidence Jones falsified a document. Jones was on Zacher’s witness list but was not called as a witness to testify about her involvement in the details of Zacher’s incident. Thomas also provided an affidavit that exonerated Jones in the matter.

Zacher failed to prove Thomas violated State Personnel Board, General Work Rule 670-X-19-.01(b)(6) Falsification of records or General Work Rule 670-X-19-

¹⁶ In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

.01(b)(13) Conduct unbecoming a state employee. While it is certainly one possibility, that Thomas was attempting to fire Zacher by omitting or falsifying documentation, the other possibility is Thomas had bad information or was only given part of the story by Reeves.¹⁷ On May 26, 2020, in the early afternoon, Thomas knew Zacher did not have COVID-19 and did not expose other employees to the virus. He continued to pursue discipline against Zacher; not for being positive and coming to work, but on other grounds. Zacher believes Thomas either hid the truth or misconstrued the truth to move forward with discipline against her. Thomas was the best witness to clarify his actions, the motivation behind his actions and what he knew when he acted. Absent his testimony on what information Reeves told him before the 1:03 p.m. facsimile from Urgent Care, it is impossible for Complainant to meet the burden of proof.¹⁸

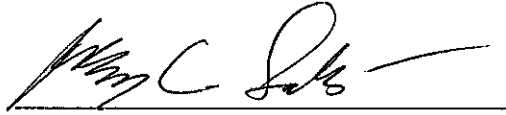
V. Recommendation

WHEREFORE PREMISES CONSIDERED, the undersigned hereby recommends that the State Personnel Board Dismiss Zacher's complaint against Jones and Thomas, WITH PREJUDICE.

¹⁷ Thomas included a statement from Zacher in his letter to the Area Operation Engineer Sharon Ellis about how she [Zacher] did not know where this came from. There Thomas attempted to offer mitigating language. It was crossed out, but there is no evidence who crossed it out.

¹⁸ All parties were represented by Counsel. Decisions are made by Parties' Counsel for tactical reasons and it is not the responsibility of the ALJ to interfere with those decisions. However, the ALJ may only consider facts and testimony that are part of the record.

Done this 4th day of August 2020.



Randy C. Sallé
Administrative Law Judge
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VIA E-MAIL AND FIRST-CLASS U.S. MAIL

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